

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ANTOINE D. JOHNSON, M.D.,

Plaintiff,

v.

GRAYS HARBOR COMMUNITY  
HOSPITAL; GRAYS HARBOR  
COMMUNITY HOSPITAL MEDICAL  
STAFF; GRAYS HARBOR COMMUNITY  
HOSPITAL GOVERNING BOARD; KI  
SHIN, MD; TIM TROEH, MD; BRENT  
ROWE, MD; GREGORY MAY, MD;  
DANIEL CANFIELD, MD; ROBIN  
FRANCISCOVICH, MD; THOMAS J.  
HIGHTOWER, MD; SHELLY DUEBER,  
MD; and DOES 1 through 50 inclusive,

Defendants.

CASE NO. C06-5502BHS

ORDER GRANTING  
DEFENDANTS TIM TROEH,  
MD; GREGORY MAY, MD;  
DANIEL CANFIELD, MD;  
SHELLY J. DUEBER, MD; AND  
ROBIN FRANCISCOVICH,  
MD'S MOTION TO COMPEL  
PRODUCTION OF  
DOCUMENTS FROM  
BROADWAY CLINIC, INC.

This matter comes before the Court on Defendants Tim Troeh, MD; Gregory May, MD; Daniel Canfield, MD; Shelly J. Dueber, MD; and Robin Franciscovich, MD's Motion to Compel Production of Documents from Broadway Clinic, Inc. (Dkt. 153). The Court has considered the pleadings filed in support of and in opposition to the motion and grants the motion for the reasons stated herein.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On August 31, 2006, Plaintiff Antoine Johnson filed suit in federal court seeking declaratory, injunctive and equitable relief, compensatory and punitive damages, and attorneys' fees and costs for (1) racial discrimination, (2) deprivation of rights under 42 U.S.C. § 1983,

1 (3) defamation of character, (4) impairing the obligation of a contract, (5) retaliation, (6) tortious  
2 interference, (7) fraud and forgery, and (8) negligence. Dkt. 1 at 10-13.

3 Dr. Johnson is the president of the Broadway Clinic, Inc. (“the Broadway Clinic”). Dkt.  
4 154 at 2. Dr. Johnson is representing himself in this matter. The Broadway Clinic is not a party  
5 to this matter; while the body of Dr. Johnson’s complaint identifies the Broadway Clinic as a  
6 plaintiff, the Broadway Clinic is not included in the caption of the complaint. *See* Dkt. 1 at 3  
7 (“Plaintiff Broadway Clinic, Inc.”); Dkt. 161 at 2 (Plaintiff’s “opposition” to the Motion to  
8 Compel, acknowledging that the Broadway Clinic is not a party to this matter).

9 On October 19, 2007, the moving defendants served Dr. Johnson, as the registered agent  
10 of the Broadway Clinic, with a subpoena duces tecum and notice of deposition of the Broadway  
11 Clinic. Dkt. 154-2. Dr. Johnson, apparently on behalf of the Broadway Clinic, objected to the  
12 subpoena duces tecum. Dkt. 154-3.

13 On October 25, 2007, certain defendants moved to compel production pursuant to the  
14 subpoena duces tecum of the Broadway Clinic. Dkt. 153. The moving defendants electronically  
15 served Dr. Johnson, as the plaintiff in this matter, with the motion to compel. It appeared that the  
16 Broadway Clinic had not been served with a copy of the motion and that Dr. Johnson was not  
17 served in his capacity as registered agent of the Broadway Clinic. *See* Dkt. 154 at 2 (certificate  
18 of service). As a result, the Court declined to consider the motion to compel (Dkt. 153) until the  
19 moving defendants offered evidence that the motion was served on the Broadway Clinic. The  
20 moving defendants thereafter filed evidence that the motion was served on Dr. Johnson in his  
21 capacity as registered agent for the Broadway Clinic, and the Court renoted the motion for  
22 consideration on November 16, 2007. Dkts. 159, 160.

## 23 II. DISCUSSION

24 Federal Rule of Civil Procedure 26 provides that “[p]arties may obtain discovery  
25 regarding any matter, not privileged, that is relevant to the claim or defense of any party.” Fed.  
26 R. Civ. P. 26(b)(1). Subpoenas are governed by Federal Rule 45:

(1) Every subpoena shall

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(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified;

Fed. R. Civ. P. 45(a)(1)(C). Subpoenas should not impose undue burden or expense.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. *The court on behalf of which the subpoena was issued shall enforce this duty* and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

Fed. R. Civ. P. 45(c)(1) (emphasis added). Information responsive to a subpoena duces tecum may be withheld on a claim of privilege:

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Fed. R. Civ. P. 45(d)(2)(A). The party seeking discovery may thereafter move to compel production as follows:

If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

Fed. R. Civ. P. 45(c)(2)(B). Before moving to compel, parties should make a good faith effort to confer and resolve the dispute themselves. *See* Local Rule CR 37(a)(2); Fed. R. Civ. P. 37(a)(2)(A). Local Rule CR 37 defines a good faith effort to confer as "a face-to-face meeting or a telephonic conference." Local Rule CR 37(a)(2).

Here, it appears that the moving defendants have attempted to confer with Plaintiff. Dkt. 154 at 2. The Broadway Clinic has not appeared or otherwise contested the motion. Pursuant to the local rules of this district, the Court may consider such failure to oppose the motion to be an admission that the motion has merit. *See* Local Rule CR 7(b)(2).

1 **A. DR. JOHNSON'S OPPOSITION TO THE MOTION**

2 Dr. Johnson filed an opposition to the motion. Dkt. 161. Pursuant to 28 U.S.C. § 1654,  
3 parties may appear personally in federal court or through licensed counsel. Courts have  
4 uniformly interpreted 28 U.S.C. § 1654 to prohibit corporations from appearing in federal court  
5 other than through a licensed attorney. *Rowland v. California Men's Colony, Unit II Men's*  
6 *Advisory Council*, 506 U.S. 194, 202 (1993). While Dr. Johnson may, pursuant to 28 U.S.C. §  
7 1654, represent himself in this matter, he may not appear or argue on behalf of the Broadway  
8 Clinic. The Court therefore considers Dr. Johnson's legal arguments as made on behalf only of  
9 himself and not on behalf of the Broadway Clinic.

10 Dr. Johnson contends that the discovery sought by subpoena of the Broadway Clinic is  
11 barred by an agreement among Plaintiff and the moving parties. Dkt. 161 at 3. The document  
12 setting out this agreement, a letter from the moving defendants' counsel, indicates that Dr.  
13 Johnson agreed to preserve and produce records for the Broadway Clinic. *See* Dkt.161, Exh. P96  
14 at 8-14. In support of Dr. Johnson's opposition, LaWanda A. Johnson declares that she was  
15 present at a meeting among Plaintiff and the moving defendants and that the parties agreed that  
16 Plaintiff would not be required to produce salary information for present and former employees  
17 of the Broadway Clinic, the identities or records of employees other than providers, or the  
18 agreements that providers had with the Broadway Clinic. Dkt. 161 at 22. The moving defendants  
19 contend that they did not reach such an agreement with Plaintiff. Dkt. 178 at 2. Dr. Johnson  
20 contends that the only discovery responsive to the subpoena of the Broadway Clinic that has not  
21 been produced falls within two categories: (1) the salaries of current and former employees and  
22 (2) "agreements of ARNP's and PA's who have worked for the clinic." Dkt. 161 at 6.

23 Former and current employees of the Broadway Clinic are not parties to this action, with  
24 the exception of Dr. Johnson, who it appears may be both an employee and the president of the  
25 Broadway Clinic. While the salary information of nonparties may not constitute privileged  
26 information per se, it is information that should be afforded protection to the extent possible. On  
27 the other hand, such information may be relevant to the issue of damages, and Defendants may  
28 require this information as part of their defense. The parties should therefore cooperate with one

1 another and with the Broadway Clinic to facilitate exchange of this information in a manner that  
2 would provide relevant information to Defendants while protecting the privacy of nonparties.  
3 The motion is therefore granted as follows: The Broadway Clinic shall produce the names,  
4 positions, and salaries of all former and current employees of the Broadway Clinic. The  
5 Broadway Clinic shall redact the names of such employees except as to employees, if any, who  
6 are relatives of Plaintiff.

7 Dr. Johnson's justification for withholding "agreements of ARNP's and PA's who have  
8 worked for the clinic" is unclear and therefore unpersuasive. To the extent that this information  
9 is responsive to the moving defendants' discovery request, the motion is granted. As to the  
10 discovery requests not specifically mentioned above, the motion is granted, and Dr. Johnson  
11 shall forthwith produce documents responsive to the moving defendants' discovery requests. The  
12 parties are instructed to meet and confer, attempt to resolve discovery and other issues in good  
13 faith, and to use conference calls to chambers before filing further discovery motions.

#### 14 **B. ATTORNEYS' FEES**

15 The moving defendants seek to recover attorneys' fees and costs associated with the  
16 Motion to Compel and "any additional discovery that may result from the objection and the  
17 delay in production by Broadway Clinic, Inc." Dkt. 153 at 2. Unless certain circumstances are  
18 present, parties who successfully move to compel are entitled to an award of fees. Fed. R. Civ. P.  
19 37(a)(4)(A). The Court has concerns regarding Plaintiff's knowledge and application of the  
20 Federal Rules of Civil Procedure. Dr. Johnson has previously been cautioned that failure to  
21 comply with discovery obligations may result in appointment of a special master to oversee  
22 discovery. Dkt. 76. Although expenses and attorneys' fees will not be awarded in connection  
23 with this motion, Plaintiff is again reminded to work cooperatively in the discovery process and  
24 to familiarize himself with discovery rules sufficiently to avoid additional unnecessary discovery  
25 disputes and exposure to an award of attorneys' fees.

#### 26 **C. SURREPLY**

27 On November 19, 2007, Plaintiff notified chambers staff of his intent to file a surreply to  
28 the Motion to Compel (Dkt. 153). *See* Local Rule CR 7(g)(2) ("That party must notify all parties

1 (by telephone or facsimile) and the assigned judge's chambers (by telephone) as soon after  
2 receiving the reply brief as practicable that a surreply will be filed.").

3 In his surreply, Dr. Johnson asks the Court to strike "Defendants' assertions that Plaintiff  
4 is being disingenuous and that there has been no agreement or stipulation between Plaintiff and  
5 the moving Defendants" as "conclusory allegations and unsupported speculation." Dkt. 180 at 1-  
6 2. As the Court has previously noted, it is unclear whether the Broadway Clinic has failed to  
7 produce information responsive to the moving defendants' discovery requests or whether such  
8 information exists. The Court therefore declines to strike the moving defendants' contentions  
9 regarding this dispute.

### 10 III. ORDER

11 Therefore, it is hereby

12 **ORDERED** that Defendants Tim Troeh, MD; Gregory May, MD; Daniel Canfield, MD;  
13 Shelly J. Dueber, MD; and Robin Franciscovich, MD's Motion to Compel Production of  
14 Documents from Broadway Clinic, Inc. (Dkt. 153) is **GRANTED** as provided herein.

15 DATED this 20<sup>th</sup> day of November, 2007.

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19 BENJAMIN H. SETTLE  
20 United States District Judge  
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